

Appl. No. 09/612,238
Amdt. dated May 19, 2004
Reply to Office Action of March 9, 2004

REMARKS

Applicant respectfully requests reconsideration followed by allowance.

New Claim 30

New claim 30 is based on the present specification, and the Examples, in which the calculated percentage ratio of protein versus carbohydrates is above 62%

Allowed Claims

Applicant acknowledges with appreciation allowability of claims 21-27.

Traversing the §112 Rejection

Applicants respectfully request the Examiner to reconsider and withdraw objections based on §112 (¶1). If there are any questions, please call the undersigned to arrange for an interview.

The original disclosure discloses above about 28% of non-denatured vital wheat gluten and therefore Applicant requests the Examiner to reconsider the rejection of claims 13-20 and 29 under 35 U.S.C. §112 (¶1).

The pertinent statutory provision in the patent law, Section 112 provides, in relevant part, that:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.

35 U.S.C. § 112, ¶ 1 (2000). Three separate requirements are contained in that provision:

Appl. No. 09/612,238
Amdt. dated May 19, 2004
Reply to Office Action of March 9, 2004

(1) "[t]he specification shall contain a written description of the invention"; (2) "[t]he specification shall contain a written description . . . of the manner and process of making and using it [i.e., the invention] in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same"; and (3) "[t]he specification . . . shall set forth the best mode contemplated by the inventor of carrying out his invention."

In common parlance, those three requirements are referred to as the "written description requirement," the "enablement requirement," and the "best mode requirement," respectively. In re Moore, 439 F.2d 1232, 1235 (CCPA 1971) ("This first paragraph analysis in itself contains several inquiries. Considering the language of the statute, it should be evident that these inquiries include determining whether the subject matter defined in the claims is described in the specification, whether the specification disclosure as a whole is such as to enable one skilled in the art to make and use the claimed invention, and whether the best mode contemplated by the inventor of carrying out that invention is set forth.").

Written description does not call for word-for-word literalism between a patent claim and the specification. Indeed, for instance, data from Examples can form the basis for expressing a temperature, a ratio or a range in a patent claim. Ex parte Jackson, 110 USPQ (BNA) 561, 562 (Bd. App. 1956).

Applicants therefore submit that calculated amount of gluten based on their Examples provides basis for the claim language under review. The attached Table reports calculations based on all the examples. The amount of gluten is given using a commercial base that contains 94% dry substance. The re-calculated dry matter is set forth in the Table. Furthermore, all the weights have been together and finally the dry matter content of gluten has been divided by the total weight of the non-aqueous medium and the lowest

Appl. No. 09/612,238
Amdt. dated May 19, 2004
Reply to Office Action of March 9, 2004

amount of dry matter of gluten present in these media is indeed above about 28%. As the Examiner will appreciate for at least 5 examples, the level is 28.6 - 28.7% and the others are all above this value.)

Claims 13-20, 28 and 29 define unobvious inventions over the Kobayashi et al. reference.

The Kobayashi et al. reference (USP 5,603,977) relates to a gummy starch and method for preparation of the same. It provides a gummy starch prepared by combining a starch and saccharide and subsequently heating the mixture. Column 1, lines 60-62. The Kobayashi et al. reference discloses an open system at column 4, lines 4-10 and discloses heating to 170°C and stirring. At column 4, lines 11-24, the Kobayashi et al. reference discloses heat treatment with reference to a time to cause the saccharide to be caramelized. The heat treatment is preferably in the range of 150 to 220°C. Column 3, line 2 and column 4, lines 13-14. The heat treatment at 150 to 220°C results in the desired gummy properties. Column 3, lines 2-4.

The Kobayashi et al. reference appears to focus mainly on a gummy starch which can be used together with other "gummy" products. Applicants respectfully submit that is also a fair and correct reading of Example 17. In this Example, 10 g of gummy starch (prepared according to Example 1) are kneaded together with 5 g of rice-wax and 5 g of gluten. It is submitted that a person skilled in the art would consider the "gluten" is an aid. In total, 20 g "gummy" products are applied, of which less than 1/4 by weight is gluten. (When a base commercial value of 94% dry substance is considered, the amount by weight of gluten drops.) But Example 17 does not stop there. When glycerol (2.5 grams) is added, according to column 7, line 53, the amount by weight of gluten drops further to maybe about 20%. Example 17 continues with direction to add 1 gram of olive oil, 15 grams of fine powdered sugar, 10 grams of corn starch and 2.5 grams of 'essence'. If the latter materials are considered then the % gluten drops to only about 9 %.

Appl. No. 09/612,238
Amdt. dated May 19, 2004
Reply to Office Action of March 9, 2004

One would be remiss by characterizing Kobayashi Example 17 as describing ro suggesting "developing" as in claim 1 or claim 28. The ambiguous reference to kneading the mixture would not have suggested a method of kneading gluten in glycerol. Gluten is only a small part of the 'gummy' product available and only a minor amount of glycerol is used. Gluten is only mentioned really in passing in a product (chewing gum) of Example 17. The reference requires a carmelization step to obtain the gummy product. Therefore, it would appear that the kneading may be a technique to mix a caramelized product with the other listed ingredients to obtain what may be "chewable foods for example chewing gum like food of sheet type."

Please reconsider and withdraw the rejection.

Claims 13-20, 28 and 29 define unobvious inventions over the Shaw reference.

The presented elected claims would have been unobvious to a person of ordinary skill in the art over the Shaw reference. The Shaw reference (USP 5,366,740) relates to chewing gum comprising wheat gluten and the methods for manufacturing such compositions. The method for preparing the chewing gum begins with blending wheat gluten and texturizing agents and specifically that the chew texture of gluten is not acceptable unless softened by the addition of calcium carbonate or glutinous rice flour. See, e.g., Column 2, lines 22-30; Column 3, line 10 et seq.

According to the Shaw reference, preparing the chewing gum begins with blending the gluten and texturizing agents such as calcium carbonate and glutinous rice flour, with dry blending being preferred. Column 4, lines 41-48. The thus obtained flavored blend is placed in a mixing kettle (Column 4, lines 49-51), although alternatively the liquid components, including water and glycerol, may be added to the powder in a low-shear mixer and then the mixing may be completed in a higher-shear mixer. Column 4, line 52 et seq.

Appl. No. 09/612,238
Amdt. dated May 19, 2004
Reply to Office Action of March 9, 2004

Glycerin and water are used in a ratio of 2 parts glycerin per part of water in the formulation in Example 1 of the Shaw reference. Column 5 (33 wt% glycerin, 15 wt% water; glycerin/(glycerin + water) = 68.7% glycerin; or in other words water/(glycerin + water) = 31% water in the medium, see Example 1, column 5). Contrariwise, in the claimed inventions vital wheat gluten, which is essentially not denaturated, can be developed in a non-aqueous medium that contains less than 20% of water as in claims 1 and 28, less than 15% water as in claim 4, and less than 10% water as in claim 15.

As a person skilled in the art would appreciate, the present Examples disclose a ratio of glycerol/total liquid of 0.79, 0.94, 0.74, and 0.86. It can be recognized that these ratios would inform a person skilled in the art that the water content is much smaller than disclosed in and suggested by Example 1 of the Shaw reference. The Shaw reference does not disclose how to reduce the quantity of water in respect to glycerol, nor apparently provide motivation to do so. The Shaw reference therefore neither describes nor would it have suggested the present claimed inventions to a person of ordinary skill in the art.

Conclusion

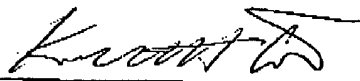
If the Examiner has any questions, please contact the undersigned by telephone. Applicants want to ensure all matters are addressed and resolved so the Examiner is satisfied.

Appl. No. 09/612,238
Amdt. dated May 19, 2004
Reply to Office Action of March 9, 2004

Applicants do, however, respectfully submit they have addressed all issues and respectfully submit that their claims are in condition to receive a Notice of Allowance.

Respectfully submitted,

FITCH, EVEN, TABIN & FLANNERY

By: 
Kendrew H. Colton
Registration No. 30,368

Enclosure: Table

Fitch, Even, Tabin & Flannery
1801 K Street, N.W.
Suite 401L
Washington, D.C. 20006-1201
Telephone No. (202) 419-7000
Facsimile No. (202) 419-7007

CERTIFICATE OF FACSIMILE: I hereby certify that these papers (Transmittal, Amendment & Table), are being transmitted via facsimile to: Commissioner of Patents, Washington, D.C. 20231, Attn: Examiner Arthur L. Corbin, on this day of May 19, 2004.

example	gluten	d.s	Dry substance gluten	rest water	glycerol	water	carbohydrate syrups	d.s.	dry substance syrups	rest water	other ingredients	
	50	0.94	47	3	50	10						
	50	0.94	47	3	50						6	
	50	0.94	47	3	60	15						
	50	0.94	47	3	50	5						
	50	0.94	47	3		18.75	81.25	0.8	65	16.25	1	3
	50	0.94	47	3		18.75	81.25	0.8	65	16.25	1	3
	50	0.94	47	3		18.75	81.25	0.8	65	16.25	1	3
	40	0.94	37.6	2.4		25	40	0.95	38.4	1.6		
	1000	0.94	940	60		375	1625	0.8	1300	325	200	20
	1000	0.94	940	60	90	200	1625	0.8	1300	325	200	20
	1000	0.94	940	60	90	200	1625	0.8	1300	325	200	20
	3000	0.94	2820	180		1125	4875	0.8	3000	975	600	60
	3000	0.94	2820	180		1125	4875	0.8	3000	975	600	60

